

*United States District Court*



**REPORT  
ON  
MEDIATION**

**2004**

# I. PROGRAM OVERVIEW

## History

The court's mediation program was the result of a recommendation made by the Civil Justice Reform Act Committee studying the court's processing of civil cases. In 1994 the court embarked on the task of starting a mediation program, and the Mediation Plan was initially the product of collaborative efforts with the Nebraska Office of Dispute Resolution ("ODR"). It utilized the administrative services of the ODR's mediation "centers" started when the Legislature passed the Nebraska Dispute Resolution Act. The initial Mediation Plan recognized that some types of cases were particularly well suited to mediated resolutions, but only pro se prisoner cases were exempt from consideration. Although the CJRA Committee had recommended that mediation be mandatory in some cases, the court decided it would not take that step initially; in fact, mediation has remained voluntary since the program's initiation.

At the beginning of the program referrals were made to approved mediators by the Mediation Centers, so Center staff were selecting mediators. This approach proved to be unsuccessful, as lawyers and parties wanted to select their own mediators. The Plan was amended in 2001 to change the selection process so lawyers and parties would select their own mediators. This change resulted, over time, in more mediated cases.

However, since the referral procedure no longer involved the centers, there was a systemic problem determining how many mediations were actually being held. This statistic-gathering difficulty remains, because many lawyers do not report to the court that they have mediated their case. Although court staff inquire about mediation when lawyers notify the court of a settlement or when the lawyers appear at final pretrial conferences, this method of counting is not foolproof, so the numbers of cases being mediated probably is higher than reported in the court's statistics.

The program was already in existence when Congress passed the Alternative Dispute Resolution Act of 1998, which required every federal district court to establish some form of ADR program, and required each court to designate an "ADR Administrator" and an "ADR Coordinator." Magistrate Judge Piester has been the court's ADR Administrator since its inception. Deputy Clerk Kathy Griess has been the court's ADR Coordinator since its inception. She monitors the referral process and the progress of mediated cases. She also administers the application process for mediators, evaluations, statistics, and the surveys utilized in this report.

Each mediator charges his/her own fee for mediations, and travel expenses and some scheduling expenses may be billed, as well. The parties are to split the fees of the mediator, unless they otherwise agree. The Federal Practice Fund may be tapped to pay mediation expenses of parties who are represented by counsel but who do not have the

funds to pay their share of the mediation fees. Upon application to the assigned judge, such parties can have their portion of the fee advanced; if the case is concluded with any payment made to that party, the advance is to be repaid to the Federal Practice Fund.

At the conclusion of the mediation sessions the parties and attorneys are asked to complete evaluation forms for submission to the court. These forms allow the court to “track” the cases mediated and their success at reaching settlements. In addition, if a case settles after the mediation, a follow-up survey is sent to the attorneys to ask if the settlement was “because of” the mediation, “in spite of” the mediation, or if the mediation had “no effect” on the settlement. (See, section II. B., below).

## Mediators

From its beginning in 1995 the mediation program has relied for its approved mediators upon trained lawyers with at least some mediation experience. Lawyers, because it was believed mediators trained in law would, more easily than others, build rapport with mediating parties and their attorneys; “trained,” because it was thought mediation would be accepted sooner if mediators had at least basic facilitation skills and mediation experience. The court approved Nebraska lawyers who had previously qualified as mediators in accordance with the Nebraska Dispute Resolution Act (for which they had to complete a four-day “basic mediation” course) or who had other comparable experience.

The court also requires an additional 24 hours of mediation skills training designed around typical disputes in federal courts (See “Training,” below), including instruction in ethics, in order to be “approved” to mediate federal cases. At the end of 2004 there were 42 mediators approved by the court.

In addition to the mediators “approved” by the court, a “cottage industry” of others has arisen in Nebraska, who are successfully offering settlement services to resolve civil cases and other disputes. Some of these lawyers have had experience and/or training in mediation in other venues, experience from conducting negotiations and/or participating in settlement conferences in this and other courts, or just “OJT.” Some of these attorneys are formerly “approved” mediators with concomitant mediation training and experience; some, however, have little training in ethics or mediation strategies and principles. These attorneys’ varying levels of experience and training may be reflected in the services they provide. Some are quite “evaluative” while others are more “facilitative,” but it is expected that as the procedures used by each become better known, the “market” will sort out the differences. The important thing is that the parties and lawyers in a case have accurate information about what to expect from their selected “neutral” person. As more attorneys have entered this market of “non-approved” settlement services providers, the number of cases mediated through the court’s program has fallen.

## Court Sponsored Mediation Skills Training

Since there was no pre-existing “culture” of mediation in Nebraska, the court offered training to lawyers already certified as mediators under the Nebraska Dispute Resolution Act. The first “Fed-Med” training was a two-day conclave held in June, 1995. Shortly thereafter the first trainees gained “approved” status. To date, a total of four “Fed-Med” training seminars have been held, the last in 2002. “Fed-Med” training is offered no more frequently than once every three years. Each of these seminars has utilized the services of an attorney trainer from the CPR Institute for Alternative Dispute Resolution, based in New York City, together with a complement of trainers from the Nebraska Office of Dispute Resolution. The arrangements for these seminars have been made by the able staff of the ODR’s Training Institute.

In addition to the “Fed-Med” training, the court also periodically holds “skills workshops” for approved mediators as a “refresher” course in mediation strategies and mediation ethics. A nationally respected mediation authority has been hired to conduct the instruction portion of these one-day workshops. Initially held annually, limited funding and attendance levels have resulted in the workshops being scheduled no more often than once every two years. The court also relies upon the able staff of the ODR’s Training Institute for the planning and arrangements for these workshops.

## Numbers

The program had a slow start, but eventually the numbers of federal cases being mediated grew, reaching a high of 70 in 2002. In 2003 and 2004, however, the number of cases known to be mediated has dropped to the pre-2002 levels. While the court is apprised that there are many more cases being mediated than are reported to us, we do not know how many that may be. Thus, our statistics reflect only those cases about which we have been told.

“\_\_\_\_\_ is an outstanding mediator & has a true gift for fairness, communication and conflict resolution. I strongly believed the outcome would not have been the same without his talents, especially since we had tried mediation in this case 3 years ago with no positive outcome. \_\_\_\_\_ kept the negotiations focused on settling the cases and was excellent in keeping the parties working on solutions & their real needs as opposed to blaming & rehashing allegations. I would highly recommend \_\_\_\_\_ in any mediation situation. If he could get these parties to settle he can find a solution to just about anything! The experience was much better than I had feared & I was satisfied with the outcome.”

– A party in a case that settled during the mediation session,  
approved mediator

## II. MEDIATION STATISTICS, 2004

### A. Raw Numbers

Period: **January - December 2004**

	Mediator Approved	Mediator Not Approved	Total
Referrals Pending Beginning of Period	1	3	4
Mediation Orders Entered	8	13	21
Mediation Orders Withdrawn	1	1	2
Settled Prior to Mediation Session	0	0	0
Referrals Pending End of Period	0	1	1
Total Cases Mediated (With MRO) <sup>1</sup>	8	14	22
Cases Mediated (No MRO)	11	11	22 <sup>2</sup>
Total Cases Mediated	19	25	44
Mediation Reference Orders, by Division	Mediator Approved	Mediator Not Approved	Total
Omaha	3	5	8
Lincoln	5	7	12
North Platte	1	0	1
Total	9	12	21
Cases Mediated Without MRO, by Division	Mediator Approved	Mediator Not Approved	Total
Omaha	6	7	13
Lincoln	5	3	8
North Platte	0	1	1
Total	11	11	22

<sup>1</sup> "MRO" means "Mediation Reference Order."

<sup>2</sup> Some mediations take place without the entry of a mediation reference order. These cases are counted when they are reported by the attorneys to have settled or when there is a final pretrial conference. If a mediated case ends by involuntary dismissal or summary judgment, however, the court is not informed of the fact or results of that mediation. Thus, there could have been more "No-MRO" mediations than appear in this report.

Outcome of Mediated Cases (MRO)	Mediator Approved	Mediator Not Approved	Total
Full Agreement	4	11	<b>15</b>
Partial Agreement	0	0	<b>0</b>
No Agreement	4	3	<b>7</b>
Outcome of Mediated Cases (No MRO)			
Full Agreement	9	9	<b>18</b>
No/Partial Agreement	2	2	<b>4</b>
<b>Total</b>	<b>19</b>	<b>25</b>	<b>44</b>
Summary of No/Partial Agreement, After Closure	Mediator Approved	Mediator Not Approved	Total
Trial Settings Pending Beginning of Reporting Period	1	19	<b>20</b>
No or Partial Agreement, This Period (from above)	6	5	<b>11</b>
Settled	3	7	<b>10</b>
Judgment Entered Without Trial or Settlement	0	1	<b>1</b>
Transfer to Bankruptcy	0	0	<b>0</b>
Trials Held During Reporting Period	2	1	<b>3</b>
Trial Settings Pending at End of Reporting Period	2	15	<b>17</b>

“\_\_\_\_\_ did a great job, as he always does. His style, knowledge of the law in our case, and litigation experience makes such a difference. I absolutely believe that I secured the best possible result for my client in this case, and that it would have been much more difficult to do that without mediation, and without \_\_\_\_\_.”

–Attorney in a case that settled during the mediation session, approved mediator

## B. Follow-up Surveys

Survey questionnaires were sent to counsel in the ten cases mediated in 2004 which did not settle at the mediations, but which DID settle later, to determine if the settlements occurred "because of" the mediation, "in spite of" the mediation, or if the mediation had "no impact" on settlement. Responses were received from twenty attorneys in ten cases:

### TOTAL **RESPONSES**:

MEDIATOR	"Because Of"	"In Spite Of"	"No Impact"	Total
APPROVED	3	1	1	5
NON-APPROVED	9	3	3	15
TOTAL	12	4	4	20

### **CASES** REPORTED ON:<sup>3</sup>

MEDIATOR	"Because Of"	"In Spite Of"	"No Impact"	Total
APPROVED	3	0	0	3
NON-APPROVED	4	2	1	7
TOTAL	7	2	1	10

This pattern of very few cases being settled after a mediation "in spite of" the mediation has been consistent over the life of the mediation program,<sup>4</sup> but particularly for the last four years. Thus, even if cases do not settle "at the table" during a mediation, there is little likelihood that mediation would harm settlement prospects.

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<sup>3</sup> It should be noted that in the "cases reported on," there were some "split" responses received, e.g. one lawyer indicating "in spite of" and the other, "no impact." In those instances the comments were used to determine where the case should be classified, with the stronger of the opinions expressed guiding the decision. When there were no comments on either rating, or the comments were of equal "intensity," the case was put in the "no impact" column.

<sup>4</sup> The numbers of cases settled after an unsuccessful mediation, in which the attorneys said the case settled later "in spite of" the mediation are as follows:

1998: 3 of 20 later settled cases

2002: 2 of 16 later settled cases

1999: 4 of 15 later settled cases

2003: 0 of 15 later settled cases

2000: 2 of 13 later settled cases

2004: 2 of 10 later settled cases

2001: 0 of 9 later settled cases

### III. CONCLUSIONS FROM THE NUMBERS

#### A. MEDIATION "CAUSED" SETTLEMENT IN 91% OF THE CASES MEDIATED:

Adding the cases settled at the mediations (33) and those later settled "because of" the mediation (7) yields a total of 40 of the 44 cases actually mediated (91%) were settled directly because of the mediation program. (Ironically, this is the same percentage of settlements as in 2003):

#### **Effects of Mediation on Settlement, 2004:**

Mediator	Cases Mediated	Settled AT Mediation	Settled "Because of" Mediation	Total Cases Settled	Effective Rate of Settlement
Approved	19	13	3	16	84%
Non-Approved	25	20	4	24	96%
Totals	44	33	7	40	91%

#### B. THE NUMBER OF TRIALS IN POST-MEDIATION CASES<sup>5</sup> CONTINUES TO BE SMALL:

There were 31 post-mediation cases tracked in 2004 (20 still pending trial at the beginning of the year, plus the 11 mediated in 2004 without settlement). Of these 31, only three cases have been tried, and 17 remained set for trial at the end of the year. In the last seven years (January 1, 1998 through December 31, 2004), there were 387 cases mediated, and 135 of those cases were not settled "at the table." Of all these cases, only 19 cases have later gone to trial, again with 17 cases remaining set for trial at the end of 2004. The highest number of trials of post-mediation cases in one year was six in 2000.

"Defendant's insurance representative did not appear at mediation, despite the order requiring appearance. As a result, plaintiff's motion for sanctions was granted. That apparently woke up the insurance representative and settlement offers suddenly became more reasonable."

– Attorney in case that settled after the mediation, "because of" the mediation, approved mediator.

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<sup>5</sup> "Post-mediation cases" are those that did not settle during the mediation itself.



**C. IN 2004 NON-APPROVED MEDIATORS HAD MORE “SUCCESS” SETTling CASES “AT THE TABLE,” AND ALSO REACHED MORE SETTLEMENTS ATTRIBUTABLE TO THE MEDIATION.**

The number of mediations and rates of settlement, divided according to whether or not the mediator was approved by the court, are below:

2004	Approved	Non-Approved	Overall Totals
Total Cases Mediated	19	25	44
Cases Settled In Mediation	13 68%	20 80%	33/44 75%
Effective Settlement Rate	16/19 = 84%	24/25 = 96%	40/44 = 91%

The differences in results as between approved and non-approved mediators has fluctuated over the last four years, the only years results were so calculated.<sup>6</sup> Those results are below:

	Approved Mediator				Non-Approved Mediator				Overall Totals				
Year	2001	2002	2003	2004	2001	2002	2003	2004	2001	2002	2003	2004	Overall 2001–2004
Cases Mediated	25	27	28	19	24	43	27	25	49	70	55	44	436
Cases Settled In Mediation	18/25 72%	19/27 70%	21/28 75%	13/19 68%	13/24 54%	20/43 47%	17/27 63%	20/25 80%	31/49 63%	39/70 56%	38/55 69%	33/44 75%	282/436 65%
Effective Settlement Rate	19/25 76%	24/27 89%	24/28 86%	16/19 84%	16/24 67%	26/43 60%	26/27 96%	24/25 96%	35/49 71%	50/70 71%	50/55 91%	40/44 91%	349/436 80%

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<sup>6</sup> In years before 2001 the statistics were divided by whether the mediator was contacted through a mediation center or directly by the parties, not by whether the mediator was approved by the court. Since 2001 the statistics have distinguished mediators by their approved/non-approved status and counted the results accordingly.

## OTHER COMPARISONS TO PRIOR PERIODS:

**Number of Cases Mediated:** The number of mediations (44) was below average. In the past six years the number of mediations in federal cases has hovered around fifty per year; except for 2002 when there were seventy mediations.

**Number of Mediation Reference Orders:** There were only 22 MROs entered in 2004. This is a continuing trend. Compared with the average number of mediated cases, this means that more attorneys are seeking mediation services without the involvement of the court. If the attorneys do not want to stay the progression of the case during the pendency of the mediation, they have no need to seek an MRO; however, when the court enters an MRO, it helps the court follow the case and tabulate the results of the mediation. Most, if not all, mediations are probably being tabulated, however, by court staff requesting information about mediation at final pretrial conferences and at the time the court is notified of a settlement.

**Geography:** Most mediation reference orders continue to emanate from Lincoln. This has been consistent over the course of the program.<sup>7</sup> However, there were more mediations without MRO's in Omaha cases, effectively balancing the two venues in cases actually mediated.

**Number of Approved Mediators:** At the end of 2004 there were 42 approved mediators. This is down from 45 at the end of 2003.

"The mediator took 'sides' with the defendant early on. The mediator basically told both sides the defense position was the proper view of the case. Notwithstanding this, the case settled a couple of months later for a figure consistent with the plaintiff's position. Both sets of attorneys knew, I feel, that the plaintiff's position was appropriate and reasonable, hence the eventual settlement. The mediator was duped, essentially, into accepting the defendant's positions during the mediation."

—Attorney in a case that settled "in spite of" the mediation, non-approved mediator.

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<sup>7</sup> 1998: 65 orders: Lincoln: 44; Omaha: 11; North Platte: 10.  
1999: 67 orders: Lincoln: 41; Omaha: 20; North Platte: 6.  
2000: 63 orders: Lincoln: 39; Omaha: 17; North Platte: 7.  
2001: 63 orders: Lincoln: 48; Omaha: 13; North Platte: 3.  
2002: 38 orders: Lincoln: 26; Omaha: 11; North Platte: 1.  
2003: 21 orders: Lincoln: 12; Omaha: 8; North Platte: 1

## IV. EVALUATIONS

After each mediation the participants were asked to complete an evaluation form, judging various aspects of their mediation from 1 (Excellent!) to 5 (Terrible!). (Copies of the evaluation forms are in the Appendix). They were asked to mail it back to the court. Averaged responses to some of the questions are set forth in the table below.<sup>8</sup>

EVALUATION QUESTION	PTY-APP	PTY-NON	ATTY APP	ATTY NON	OVERALL
"How was the mediator at remaining neutral?"	2.00	1.25	1.14	1.56	1.49
"During the mediation session, how was the mediator-- ...at giving you opportunities to express your views?"	1.57	1.33	1.14	1.39	1.36
"...at understanding your/your client's interests and needs in the dispute?"	2.43	1.33	1.43	1.44	1.66
"...at allocating appropriate time for the mediation?"	2.71	1.42	1.33	1.36	1.71
"...at treating you with fairness and respect?"	1.71	1.67	1.29	1.33	1.50
"How well were the legal issues of the case identified and discussed during the session?"	2.00	2.00	1.57	1.50	1.77
"Overall, how would you rate the mediation process in your case?"	2.67	1.55	1.57	1.53	1.83
"From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved?"	2.17	1.81	1.57	1.50	1.76

If these numbers are statistically significant, attorneys' evaluations of their mediations were perhaps slightly more positive than those of parties' and insurers' evaluations, and non-approved mediators get about the same "grades" as approved mediators. Because of the small number of cases mediated, however, it is doubtful that these numbers are statistically sound. These scores are generally consistent with evaluations received throughout the life of the program; viewed historically, 2004 appears not to have been significantly different from the overall tallies for preceding years

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<sup>8</sup> "PTY-APP" means "Parties and Insurers–Approved Mediators." "PTY NON" means "Parties and Insurers–Non-Approved Mediators." "ATTY APP" means "Attorneys–Approved Mediators." "ATTY NON" means "Attorneys–Non-Approved Mediators."

Unlike prior years, the participants' perceptions of the quality of the mediation and the mediator appeared to be influenced slightly by whether or not the case settled "at the table." Classed by whether the case settled at the mediation, the evaluations yielded these averages:

EVALUATION QUESTION	CASE <b>DID</b> SETTLE IN MEDIATION SESSION			CASE <b>DID NOT</b> SETTLE IN MEDIATION SESSION		
	PRTY	ATTY	AVE	PRTY	ATTY	AVE
"How was the mediator at remaining neutral?"	1.27	1.38	1.33	2.50	1.75	2.13
"During the mediation session, how was the mediator-- "...at giving you opportunities to express your views?"	1.40	1.29	1.35	1.50	1.50	1.50
"...at understanding your/your client's interests and needs in the dispute?"	1.40	1.38	1.39	3.00	1.75	2.38
"...at allocating appropriate time for the mediation...?"	1.47	1.25	1.36	3.50	1.75	2.63
"...at treating you with fairness and respect?"	1.13	1.29	1.21	2.00	1.50	1.75
"How well were the legal issues of the case identified and discussed during the session?"	1.92	1.38	1.65	2.25	2.00	2.13
"Overall, how would you rate the mediation process in your case?"	1.50	1.35	1.43	4.00	2.50	3.25
"From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved?"	1.71	1.42	1.57	3.00	2.00	2.50
"How efficient was the procedure of court referral and arranging the mediation session?"	1.91	1.42	1.67	1.50	1.33	1.42

The scores on both of the sections on this table are slightly less favorable than those of a year ago. Again, however, given the small number of mediations, there does not appear to be enough difference to be significant.

**Would these settlements have eventually occurred anyway, without mediation?**

This question is asked on the evaluation questionnaires. Unfortunately, there were too few responses to make any sense of them statistically.

**Does mediation save time or money?** Participants were also asked to state if they thought their mediation saved them time and/or money in resolving the case when and how they did, and if so, how much. There were perhaps too few of these “guesstimates” to average meaningfully,<sup>9</sup> although the numerical grade responses to the questions indicate some perception of savings.

EVALUATION QUESTION	PRTY	ATTY	OVERALL AVERAGE
“To what extent do you think the mediation saved you money in resolving this case?”	1.50	1.78	1.72
“Please ‘guesstimate’ how much money saved”			\$46,520.83 <sup>10</sup>
“To what extent do you think mediation saved you time in resolving this case?”	1.73	1.22	1.28
Please ‘guesstimate’ how much time saved, i.e. “hours of attorney time”			119.58 <sup>11</sup>

**QUALITATIVE INTANGIBLES.** Mediation often causes parties to feel that they have been “heard” by a neutral person, thereby creating a perception of fairness not achieved in “traditional” negotiations. By drawing the parties into active involvement in the negotiation process, mediation gives them greater control over how their dispute is ended. This “involvement, control, and fairness” factor is reflected by the responses to the five questions evaluating the mediator's neutrality, giving parties the chance to express their views, treatment of the parties, understanding their “interests and needs” in the case, and the extent to which the legal issues were discussed. These indicators have consistently been positive over the course of the program.

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<sup>9</sup> Money Saved--Attorneys: 19 estimates (High of \$300,000 and low of \$1,000).  
Money Saved--Parties/Insurers: 5 estimates were received.  
Time Saved--Attorneys: 18 estimates (High of 1,090 hours and low of 20 hours).  
Time Saved--Parties/Insurers: 6 estimates were received.

<sup>10</sup> Since there were only twenty-four responders, the separate averages for parties and attorneys were omitted in favor of one, overall average “guesstimate” of both money saved and hours saved.

<sup>11</sup> See previous footnote.

## V. CONCLUSIONS

- ✓ In 2004 mediation caused or accelerated settlements in **91%** of the cases mediated, the same percentage as in 2003.
- ✓ The combined “effective settlement rate” for the last four years, 2001 - 2004, is **80%**.
- ✓ Since the court’s first mediation referrals (1996) **over 2/3 of the cases mediated have settled** either “at the table” or “because of” the mediation. This “effective settlement rate” for the entire eight-year period is **68%**.<sup>12</sup>
- ✓ The low number of federal cases mediated continues.
- ✓ In 2004 a number of participants thought mediation saved them time and/or money, but so few participants evaluated that factor that the average may not be meaningful.
- ✓ Participants’ opinions of their mediation experience indicate mediation does foster a perception of fairness, involvement, and control among parties.
- ✓ There are a few mediators, both approved and not approved, who seem to be the leaders in attracting federal cases for mediation. Thus, our statistics are not as “broad-based” as they would be were the cases spread more evenly among mediators. The “market” drives the selection of mediators by the attorneys in each particular case, and the selection process is a complicated mixture of factors, unique in many cases.

“I think the mediator quickly ascertained that settlement was going to be difficult because of the parties inconsistent views regarding risk & value, and forced the issue to a head quickly, saving expense for both parties. But I felt a little more time might have been conducive to reflection and movement toward settlement.”

– Party in case that did not settle during mediation; approved mediator.

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<sup>12</sup> For the eight-year period 1997-2004, of 429 cases mediated there were 290 settlements attributable to mediation. The previous highest “effective settlement rate” was 91% in 2003; the lowest was 47% for the first period of the program’s existence, the 18-month period ended 12/31/97 (counted in this tabulation as one year).

## VI. OUTLOOK

This is a “good news, bad news” report. While the success of mediation has been amply demonstrated over the years, the numbers of cases mediated continues to be discouraging. Even though the statistical information regarding settlements reached is very positive, and the evaluations are very positive, the ADR Coordinator reports great difficulty in getting evaluation questionnaires returned for tabulation, and in learning about and tracking cases that are mediated. Combined with the falling numbers of cases mediated, and a lack of positive endorsement by some of the judges, it appears that the court’s program is lacking.

Even with the court’s criminal caseload burgeoning, reduced judicial resources, and sometimes correspondingly longer delays in reaching civil cases for trial, the number of cases mediated—never very high---has fallen. Despite efforts by the magistrate judges to encourage mediation during their planning conferences with lawyers, the low numbers persist. Mediation appears to be a viable means to help ameliorate trial backlogs, but the court’s program is not fully utilized. While it is possible the “real” numbers may be higher than reported here, considering all the efforts of court staff to ensure no mediated case “falls through the cracks,” these numbers cannot be too far off the mark. The court’s mediation program may have outlived its usefulness in its present form.

In the beginning years of the program it was thought that even though Nebraska attorneys would be naturally reluctant to try mediation at first, eventually the rates of settlements would “prove its mettle.” In fact, the percentage of settlements from mediation has risen steadily over the years, yet, the number of cases mediated continues to lag. When the program began, it depended on the state’s mediation centers to select and assign mediators to the cases, and that was reportedly a cause of great reluctance on the part of lawyers. That procedure was abandoned in 2001, so that the lawyers and parties select their own mediator. Yet, the number of cases mediated continues to lag. Why?

Some federal courts make mediation mandatory in nearly all civil cases. In this court the judges were understandingly reluctant to make mediation mandatory at the beginning of a new, untested program being established in a state with no pre-existing “mediation culture.” Perhaps that is changing. However, at this time there remains no requirement that the attorneys in a case mediate it or even consider mediation.

It can be safely said that the court’s program is no longer an essential part of the mediation “universe” in Nebraska. There are many mediators---or rather, people who offer “settlement services,” whether or not those services could be termed “mediation” in a strict sense—now serving Nebraskans. That “market” is now known and available to litigants and their attorneys, at varying fees, without any involvement or encouragement from the court. While acknowledging that the program served as a catalyst in creating that “market,” it may now be appropriate to simply “step out of the way” and let the market forces work their magic.

Perhaps it is time that the court reexamine how or whether it wishes to play an active roll in alternative dispute resolution in Nebraska.

# APPENDIX

1. EVALUATIVE COMMENTS, 2004 .....	i
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# **1. EVALUATIVE COMMENTS, 2004**

## **A. PARTIES' COMMENTS ON EVALUATION FORMS**

The evaluation forms were distributed to participants in the mediations held through the auspices of approved federal mediators as well as the non-approved mediators. The comments received from the parties and insurance company claims representatives appear below:

### **In Cases That Did Settle During the Mediation Session (Approved Mediator):**

"\_\_\_\_\_ is an outstanding mediator & has a true gift for fairness, communication and conflict resolution. I strongly believed the outcome would not have been the same without his talents, especially since we had tried mediation in this case 3 years ago with no positive outcome. \_\_\_\_\_ kept the negotiations focused on settling the cases and was excellent in keeping the parties working on solutions & their real needs as opposed to blaming & rehashing allegations. I would highly recommend \_\_\_\_\_ in any mediation situation. If he could get these parties to settle he can find a solution to just about anything! The experience was much better than I had feared & I was satisfied with the outcome."

"\_\_\_\_\_ did a excellent job. He has a great voice and a calming nature. I felt I could trust him fully. He needs to get the air conditioning fixed in his office however."

"Thanks."

### **In Cases That Did Settle During the Mediation Session (Non-Approved Mediator):**

"Mr. \_\_\_\_\_ is very professional & personable."

### **In Cases That Did Not Settle During the Mediation Session (Approved Mediator):**

"\_\_\_\_\_ is a nice guy but not a particularly adept mediator. He was not active. He did not use any particular mediation skills (suggest a \$ figure, challenge expectations, critique arguments, ask hard questions, prepare a mediators number to advance the core to resolution). He did not appear committed to resolving the case and substituted speed for movement."

"The mediator did not function as a mediator. He merely kept bringing each side into the other so we could explain our positions. The mediator added absolutely nothing to the process. We made no progress at all toward settlement. It was a wasted day."

"I think the mediator quickly ascertained that settlement was going to be difficult because of the parties inconsistent views regarding risk & value, and forced the issue to a head quickly, saving expense for both parties. But I felt a little more time might have been conducive to reflection and movement toward settlement."

"The mediator was unsuccessful due to 3<sup>rd</sup> party (Ins. Co.) "low balling" the value of the personal injury claim."

**In Cases That Did Not Settle During the Mediation Session (Non-Approved):**

No comments received.

**B. ATTORNEYS' COMMENTS RECEIVED ON EVALUATIONS**

**In Cases That Did Settle During the Mediation Session (Approved):**

"\_\_\_\_\_ did an outstanding job!"

"\_\_\_\_\_ is an excellent mediator!"

"\_\_\_\_\_ did a great job, as he always does. His style, knowledge of the law in our case, and litigation experience makes such a difference. I absolutely believe that I secured the best possible result for my client in this case, and that it would have been much more difficult to do that without mediation, and without \_\_\_\_\_."

"I, of course, love mediation."

**In Cases That Did Settle During the Mediation Session (Non-Approved):**

"Mr. \_\_\_\_\_ is an outstanding mediator. I would recommend him without hesitation for other mediations."

"Good process."

"\_\_\_\_\_ is a very good, proactive mediator."

"\_\_\_\_\_ does a good job. Excellent to work with. Good demeanor and people skills."

"Mr. \_\_\_\_\_ did an excellent job."

“Mr. \_\_\_\_\_ did an excellent job. I would highly recommend him as a mediator on any civil case.”

“The defendant’s insurance company offered its full coverage for settlement. It was just a matter of dividing the money between several claimants.”

“First time with this mediator. Very expressive, which I find helpful.”

“\_\_\_\_\_ is an excellent mediator.”

**In Cases That Did Not Settle During the Mediation Session (Approved):**

“It did not settle because the defendant’s insurance representative did not appear in person and had limited authority.”

**In Cases That Did Not Settle During the Mediation Session (Non-Approved):**

No comments received.

**C. LAWYERS’ COMMENTS RECEIVED IN FOLLOW-UP SURVEY**

**Approved: "Because Of":**

“Defendant’s insurance representative did not appear at mediation, despite the order requiring appearance. As a result, plaintiff’s motion for sanctions was granted. That apparently woke up the insurance representative and settlement offers suddenly became more reasonable.”

“I think the process made both parties aware of risk factors not seriously contemplated before our session. We were also able to identify and discuss certain assumptions that were inaccurate (previous settlement agreements by defendant of which plaintiff was aware, would not be matched). My clients, though initially resistant, received a better appreciation of the difficulty they would have proving their case through the mediation process. I believe that this motivated them to explore settlement after only a week or so after the mediation was completed. Although I have been trained in this type mediation (interest-based), the mediator was more facilitative than my training led me to expect. We progressed efficiently in our discussions and reached an impasse, because our pre-mediation limits left us a ways apart. Following mediation, my clients moved some, and prompted a positive response by the defendant which allowed us to settle the case.”

"I think, it settled well after mediation & defendant's counsel never referred to what prompted settlement. I know the mediator felt she couldn't get us there & we were still a ways apart. Nonetheless, I think points were made regarding potential liability that mattered. They did go from the position of refusing to discuss settling to offering a settlement so something made a difference."

**Approved: "In Spite Of":**

"Mediator was ineffective. Parties were motivated to settle and eventually settled because plaintiff realized litigation expense outweighed best potential recovery. Mediation was useful in 1) allowing plaintiff to state her case. 2) Allowing plaintiff's husband to hear and appreciate significance of defenses. Always favor mediation."

**Approved: "No Effect":**

"I have been involved in mediations for 20 years. Mediations used to be informal attempts to 'get the case settled.' Mediations became popular and now are too 'systemized.' Too many rules and regulations are making their way into what should be an informal process. A mediator should keep the parties talking - not force a settlement."

**Non-Approved: "Because Of":**

"This case settled during and as a result of mediation. Mediation resulted in settlement. Mediator was very effective. This was a tough case to get settled." (There was a partial settlement reached in this particular case.)

"The case settled in mediation. The mediator did an excellent job. I have no hesitation recommending him again. (There was a partial settlement reached in this particular case.)

"As I recall, the parties closed the gap at mediation and were able to settle shortly after mediation. (There was a partial settlement reached in this particular case.)

"Case settled a couple of months after mediation with help of mediator follow-up."

"The mediator, \_\_\_\_\_, continued to broker settlement negotiations at no charge following the failed mediation. The mediation was essential to make the plaintiff realize his damage case was not as strong as he originally believed."

"At the mediation session the defendant kept pushing rehiring the plaintiff as a means of minimizing the plaintiff's damages. The session gave us the opportunity to express face to face

and in no uncertain terms, that the plaintiff would never return to work for the defendant. The session failed, but the defendant's attitude changed thereafter."

"The mediation facilitated the initial movement of the parties, coupled with a court ruling on a motion for summary judgment. I think mediation caused both parties to reflect on the risks of litigation."

"We mediated a complete settlement of this case before \_\_\_\_\_. \_\_\_\_\_ was terrific and very easy to work with. The diligence of the Court with ruling pre-trial motions greatly assisted in the resolution of this case (this case was partially settled at mediation - a full settlement was reached after the mediation)."

"This case settled during and as a result of mediation. Mediation was very effective. This was a tough case to get settled (this case was partially settled at mediation - a full settlement was reached after the mediation)."

"The case settled in mediation. The mediator did an excellent job. I have no hesitation recommending him again (this case was partially settled at mediation - a full settlement was reached after the mediation)."

"As I recall, the parties closed the gap at mediation and were able to settle shortly after mediation (this case was partially settled at mediation - a full settlement was reached after the mediation)."

**Non-Approved: "In Spite Of":**

"This mediation with the State was fruitless, because State officials came without any authority to settle, including amount, person there with authority, etc. This case then continued through defensive motions without trial, and three interlocutory appeals to the 8<sup>th</sup> Circuit for nine years. This case settled out of exhaustion of the plaintiff, not because the merit interest in his favor. The State of Nebraska was an exceedingly obstinate party, using many delay tactics. I'd be curious if mediation involving the state is ever successful. The State has little to no interest in a mediated settlement, in my experience in this case and others. Otherwise, I encourage more mediation activity."

"The plaintiff had unrealistic expectations at the mediation. The defendants were insulting in their position about returning to work. The parties were polarized."

"The mediator took 'sides' with the defendant early on. The mediator basically told both sides the defense position was the proper view of the case. Notwithstanding this, the case settled a couple of months later for a figure consistent with the plaintiff's position. Both sets of attorneys knew, I feel, that the plaintiff's position was appropriate and reasonable, hence the eventual settlement. The mediator was duped, essentially, into accepting the defendant's positions during the mediation."

**Non-Approved: "No Effect":**

One survey was received marked "Mediation had no impact on the ability to reach settlement," however, there were no comments.

"Mediation made it clear the defendant was not going to pay a large sum to settle case. Unless trial went extremely well for plaintiff, the defendant was not going to offer more \$."

"Mediation took place at a time when factual discovery had been completed and valuation expert reports had not yet been fully developed or exchanged. This is a reasonable time to explore mediation, as it has the benefit of saving both sides from the expense of expert fees. However, it left the parties too far apart for mediation to be fruitful. The plaintiff was underinsured, because it had failed to purchase business interruption insurance. The court denied that part of the insurer's motion for summary judgment which sought to carve out the exaggerated portions of the plaintiff's claim. Thus, at mediation, plaintiff continued to press for valuations of physical loss and damage which included business interruption-type losses with it. These elements of the claim were not covered by the policy of insurance. The case settled after expert reports were exchanged. The valuation numbers in those reports provided a framework for compromise. Also, expert depositions had not yet begun and so the parties were motivated to save that expense. In retrospect, an effort at a global mediation which would have included resolution of the state court proceeding against the broker may have been in the best interests of all parties. However, the state court's stay of proceedings in that action may have interfered with the factual development of that case to a point where mediation would be productive. It was plaintiff's preference to stay the state court matter, and thereby allow it to have two fora in which to have its damages measured."

## 2. EVALUATION QUESTIONNAIRE FORMS

### FORM 1: EVALUATION OF MEDIATION—ATTORNEYS

Name of Case: \_\_\_\_\_ Number of Hours in Session(s): \_\_\_\_\_

Mediator(s): \_\_\_\_\_

Date, Place of Mediation Session(s): \_\_\_\_\_

I am: \_\_\_\_\_ plaintiff(s) attorney  
\_\_\_\_\_ defendant(s) attorney

This mediation resulted in:  
\_\_\_\_\_ full settlement of case  
\_\_\_\_\_ partial settlement  
\_\_\_\_\_ no settlement of the case

For each question below, please circle the response that reflects your opinion, using the following key for your answers: 1="Excellent!"; 2="Good"; 3="Adequate"; 4="Poor"; 5="Terrible!"

1. How efficient was the procedure of court referral and arranging the mediation session? 1 2 3 4 5
  2. How was the mediator at explaining mediation? 1 2 3 4 5
  3. During the mediation session(s), how was the mediator at:
    - a. Giving you opportunities to express your views? 1 2 3 4 5
    - b. Understanding your client's interests and needs in this dispute? 1 2 3 4 5
    - c. Treating you with fairness and respect? 1 2 3 4 5
  4. How was the mediator at remaining neutral? 1 2 3 4 5
  5. How well were the legal issues of the case identified and discussed during the session? 1 2 3 4 5
  6. How was the mediator at allocating appropriate time for the mediation without rushing you to reach an agreement or dragging out the process? 1 2 3 4 5
- \_\_\_\_\_ Moved too quickly    \_\_\_\_\_ Moved too slowly    \_\_\_\_\_ Paced right

7. If you reached full or partial agreement,

- a. To what extent was the mediator responsible for it? 1 2 3 4 5
- b. To what extent do you think the mediation saved you money in resolving this case? 1 2 3 4 5
- c. Please "guesstimate" how much money saved: \$\_\_\_\_\_
- d. To what extent do you think the mediation saved you time in resolving this case? 1 2 3 4 5
- e. Please "guesstimate" how much time saved:  
\_\_\_\_\_ hours of attorney time

8. If you reached full settlement, in your view, would the case have settled later without mediation?  
\_\_\_\_\_ yes \_\_\_\_\_ no

9. If you reached only partial agreement, to what extent was the mediator helpful in identifying possible areas of future agreement? 1 2 3 4 5

10. From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved? 1 2 3 4 5

11. Overall, how would you rate the mediation process in your case? 1 2 3 4 5

12. How appropriate was the fee? \_\_\_\_Too High \_\_\_\_Too Low \_\_\_\_ About Right

13. How helpful was it that the mediator was a lawyer? \_\_\_\_Very \_\_\_\_Somewhat \_\_\_\_ Not

COMMENTS: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

THANK YOU!!



## FORM 2: EVALUATION OF MEDIATION--PARTIES AND INSURERS

Name of Case: \_\_\_\_\_ Number of Hours in Session(s): \_\_\_\_\_

Mediator(s): \_\_\_\_\_

Date, Place of Mediation Session(s): \_\_\_\_\_

I am: \_\_\_\_\_ plaintiff  
\_\_\_\_\_ defendant  
\_\_\_\_\_ plaintiff's insurer/subrogee  
\_\_\_\_\_ defendant's insurer

This mediation resulted in:  
\_\_\_\_\_ full settlement of case  
\_\_\_\_\_ partial settlement  
\_\_\_\_\_ no settlement of the case

For each question below, please circle the response that reflects your opinion, using the following key for your answers: 1="Excellent!"; 2="Good"; 3="Adequate"; 4="Poor"; 5="Terrible!"

1. How efficient was the procedure of court referral and arranging the mediation session? 1 2 3 4 5
2. How was the mediator at explaining mediation? 1 2 3 4 5
3. During the mediation session(s), how was the mediator at:
  - a. Giving you opportunities to express your views? 1 2 3 4 5
  - b. Understanding your interests and needs in this dispute? 1 2 3 4 5
  - c. Treating you with fairness and respect? 1 2 3 4 5
4. How was the mediator at remaining neutral? 1 2 3 4 5
5. How well were the legal issues of the case identified and discussed during the session? 1 2 3 4 5
6. How was the mediator at allocating appropriate time for the mediation without rushing you to reach an agreement or dragging out the process? 1 2 3 4 5

\_\_\_\_\_ Moved too quickly    \_\_\_\_\_ Moved too slowly    \_\_\_\_\_ Paced right

7. If you reached full or partial agreement,

a. To what extent was the mediator responsible for it? 1 2 3 4 5

b. To what extent do you think the mediation saved you money in resolving this case? 1 2 3 4 5

c. Please "guesstimate" how much money saved: \$\_\_\_\_\_

d. To what extent do you think the mediation saved you time in resolving this case? 1 2 3 4 5

e. Please "guesstimate" how much time saved:  
\_\_\_\_\_ hours of attorney time \_\_\_\_\_ hours of your time

8. If you reached full settlement, in your opinion would the case have settled later without mediation? \_\_\_\_ yes \_\_\_\_ no

9. If you reached only partial agreement, to what extent was the mediator helpful in identifying possible areas of future agreement? 1 2 3 4 5

10. From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved? 1 2 3 4 5

11. Overall, how would you rate the mediation process in your case? 1 2 3 4 5

12. How appropriate was the fee? \_\_\_\_Too High \_\_\_\_Too Low \_\_\_\_About Right

13. How helpful was it that the mediator was a lawyer? \_\_\_\_Very \_\_\_\_Somewhat \_\_\_\_Not

COMMENTS: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

THANK YOU!!